FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 970

KAHN ENGINEERING CO., INC., *Petitioner*,

v.

AMERICAN SECURITY & TRUST COMPANY, a banking corporation, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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KAHN ENGINEERING CO., INC., *Petitioner,*

v.

AMERICAN SECURITY & TRUST COMPANY, a banking corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Kahn Engineering Co., Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on December 11, 1958.

CITATIONS TO OPINIONS BELOW

The oral opinion of the trial court was not reported, but is printed in Appendix A hereto, *infra*, p. 1a.

The opinion of the Court of Appeals, as amended by the order of that Court dated February 26, 1959, printed in Appendix B hereto, *infra*, pp. 2a, 3a, is reported in 263 F. 2d 485 (adv.).

JURISDICTION

The judgment of the Court of Appeals was entered December 11, 1958. (R., p. 187) Petitioner filed its petition for rehearing on December 23, 1958. (R., p. 188). By order dated February 26, 1959, the Court of Appeals modified its former opinion. (R., p. 207) The petition for rehearing was denied March 2, 1959. (R., p. 208). The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals so far departed from normal and accepted judicial procedure as to warrant supervisory action by this Court, when it rested its affirmance of a directed verdict upon a document which had not been tendered or received in evidence, and when available evidence challenging the validity of the document had not been presented, since the trial Court, in directing the verdict on a wholly different ground, had expressly refused to consider the document in question?

STATUTES INVOLVED

The statute involved in this case is the Uniform Negotiable Instruments Law, Act of March 3, 1901, 31 Stat. 1395, ch. 854, § 1304 et seq., 28 D. C. Code (1951 Edition), § 101 et seq. Pertinent provisions of this statute are set forth in Appendix D, hereto, *infra*, pp. 4a to 7a.

STATEMENT

This suit sought to recover the value of a check belonging to petitioner, a financially distressed corporation, from the respondent bank, which had accepted the check under an unauthorized endorsement, and thereafter collected it from the drawee bank.

The check in question was drawn by the Treasurer of Baltimore County, Maryland, payable to the order of "Kahn Engineering Company" (R., p. 118a, Plaintiff's Exhibit #4), in the amount of $23,069.41. It was one of a series of checks issued by the County Treasurer in payment of the county's obligation under a contract for the construction of a Police and Fire Station at Parkville, Baltimore County, Maryland, (R., p. 95), to which (Plaintiff's Exhibit #2, R., pp. 113-116) the parties were the County Commissioners of Baltimore County, and Kahn Engineering Co., Inc., the petitioner. The performance bond (Plaintiff's Exhibit #3, R., pp. 116-118) required under the contract was executed by Kahn Engineering Co., Inc., as principal, and Maryland Casualty Company, which had been indemnified against loss on the bond by the petitioner and by its president, J. Leon Kahn, individually, as surety.

At the time of this contract, the stock of the petitioner was owned by J. Leon Kahn, his wife, Helen Kahn, and by Herbert L. Bright and his wife as joint owners of one half of the company's stock. Mr. and Mrs. Kahn were the officers and directors of petitioner. Bright was its agent in charge of outside work, but was neither an officer nor a director.

Prior to the execution of the Parkville contract, Kahn and Bright had formed "Kahn Engineering Co. of Md., Inc." (R., p. 25). At the time the Parkville

contract was entered into by the plaintiff, Kahn and Bright were the stockholders of the Maryland corporation, (R., p. 25) and were officers. (R., p. 25). Mark C. Fox was president of the Maryland corporation at this time. (R., p. 25) Later, Fox was succeeded by L. Ray Troxell, Jr. (R., p. 96). There seems to have been an informal arrangement by which the employees of the Maryland corporation supervised the Parkville work for the petitioner. (R., p. 45). However, nothing in the record indicates that the contract was assigned to the Maryland corporation, or that the Maryland corporation assumed any financial responsibility for the performance of the work. Prior to April, 1954, three of the checks issued by the County officials had been made payable to Kahn Engineering Co. of Md., Inc. (R., pp. 56, 58, 60)

In April, 1954, Kahn sold his stock in the Maryland corporation to Bright, (R., p. 25) who became its sole stockholder. The name of the Maryland corporation was, at that time, changed to Academy Construction, Inc. The officials of Baltimore County in charge of the Parkville job were advised of this change of name of the Maryland company, (R., pp. 86, 95). There after, the County's checks were made payable to "Kahn Engineering Company."

The authority to indorse any checks which belonged to the petitioner was limited by its by-laws (R., pp. 122, 123, Plaintiff's Exhibit #7, Article VII) to its treasurer, and as to him, the authority was limited to the endorsement of checks for deposit in the corporate depositary, the Anacostia National Bank of Washington, D. C. (R., p. 120). Troxell was not an officer, nor even an employee, of the petitioner. (R., p. 27) Mr. Kahn, who was petitioner's treasurer (R.,

p. 21), testified that he had never authorized Troxell to negotiate any checks belonging to the Petitioner. (R., p. 32).

The check here in suit was dated August 11, 1954, and was intended to pay the August requisition on the Parkville contract. On August 13, 1954, it was endorsed by Troxell with the following endorsement:

> Kahn Engineering Co.
> L. Ray Troxell Jr.
> President
> Deposit to Account of
> Academy Construction Inc.

The check was then accepted by American Security & Trust Co. as a part of a deposit by Academy Construction Inc., which had opened its account with the bank on August 10, 1954, (R., p. 102). The bank had never dealt with Kahn Engineering Co., Inc. (R., p. 32).

The bank's handling of the check in question was described by Mr. Chester Sellner, its treasurer, who testified, "The check was accepted as a deposit along with three other checks, nor was it known at the time that the check was payable to Kahn Engineering Company, . . ." (R., p. 100). The bank had no knowledge of any of the facts concerning the Parkville job, nor as to the companies involved. (R., p. 101) Mr. Sellner described the endorsement as "abnormal" (R., p. 102), and testified: (R., p. 103)

> Q. And it was made payable to a different corporation and transferred by an unusual endorsement in banking practice, from one corporation to another, and your bank didn't make any investigation to find out anything about any of these corporations; is that correct, Mr. Sellner? A.

> That is right. We didn't know anything about them.

At the close of the plaintiff's evidence, the defendant moved orally for a directed verdict. The grounds of its motion (R., pp. 106-110) may be summarized as follows:

(1) that the bank was prejudiced by its failure to receive timely notice that the check was the property of petitioner;

(2) that there was no competent evidence that the check was the property of the petitioner;

(3) that the evidence established that the Maryland corporation was the agent of the petitioner, and that under the provisions of the Uniform Fiduciaries Act, the bank was not chargeable in the absence of actual knowledge of the breach of the agent's trust;

(4) that petitioner was estopped by the doctrine that when one of two innocent parties must bear a loss, the party whose actions set the possibility of loss in motion should bear it;

(5) that the claim was barred by the Statute of Limitations.

The trial court sustained this motion (R., p. 110), stating:

> The Court concludes on the basis of the testimony before it and confining its ruling, of course, to the testimony and the exhibits which are actually in evidence, that the plaintiff has not made a case against the bank. I don't think under the circumstances of this case that the defendant, American Security & Trust Co., is liable. . . .

> . . . I am convinced upon the basis of the testimony before me that there is no liability on the part of the bank under the peculiar circumstances of this case, and giving recognition to the fact that the defendant bank was not the bank upon whom the check was drawn, nor was it the bank in which the corporate account of the plaintiff was maintained. I believe that under all of these qualifying circumstances in this case that the Court is required to grant the motion for directed verdict for the American Security & Trust Company.

The Court of Appeals affirmed the judgment, originally basing its opinion upon the supposed assignment of Kahn Engineering Co., Inc.'s claim against Academy Construction, Inc., to Bright. The document to which the Court of Appeals referred was one of a series of documents identified by J. Leon Kahn as bearing his signature (R., p. 76). However, these documents were never offered nor received in evidence, because "appellee took care not to offer this document in evidence so that it might move for a directed verdict at the conclusion of the appellant's case, . . ." (Answer of Appellee to Petition for Rehearing, p. 1, R., p. 204)

The Court of Appeals thus based its action on a document which was not part of the record, and on a ground not urged by the respondent in its motion for directed verdict. The trial Court expressly refused to consider any exhibits except those actually admitted in evidence. (R., p. 110). Consequently, petitioner was denied relief upon a basis not argued at trial, and without consideration of the cogent reasons for asserting the invalidity of the supposed assignment.

The petition for rehearing called the attention of the Court of Appeals to the fact that alleged assignment had not been tendered in evidence. Consequently, the petition set forth, the petitioner had not argued the reasons why the supposed assignment was not binding upon the corporation. These reasons, specifically set forth in the Petition for Rehearing, (R., pp. 188-203) were

1. The assignment was not authorized by the corporation;

2. The document was not intended to assign the corporation's claim for the bank's tort, of which neither petitioner nor Kahn then had knowledge.

3. The purported assignment of petitioner's assets in exchange for the surrender and cancellation of its own stock was fraudulent as to its creditors.

In response to this petition for rehearing, the Court of Appeals, on February 26, 1959, amended its prior opinion by ordering the insertion of the following paragraph:

> Even assuming that the above assignment was ineffective, as to the subject matter of this litigation, plaintiff failed to make out a prima facie case that it was named payee of the check in question. There was no evidence whatsoever as to the actual intent of the maker and it could be reasonably inferred from the record that the plaintiff was not the named payee. Plaintiff thus failed to produce any evidence on a critical point of its case.

On the basis of this further statement, the Court of Appeals denied the Petition for Rehearing.

REASON FOR GRANTING THE WRIT

The writ of certiorari should be granted in this case because the action of the Court of Appeals, in affirming an erroneous direction of verdict by the trial court on a ground outside the record on which the petitioner had had no effective opportunity to be heard, was a patent departure from normal and accepted judicial procedure.

The trial Court directed a verdict against the plaintiff because of a claimed lack of privity between the petitioner and the collecting bank. (R., p. 110, 111). This ruling was erroneous because it was contrary to the decision of the Court of Appeals for the District of Columbia in *Merchants' Bank* v. *National Capital Press,* 53 App DC 59, 288 F 265, 31 ALR 1066, as well as the practically unanimous weight of authority.[1]

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[1] This decision of the Court of Appeals is in accord with the practically unanimous weight of American authority. Twenty-nine American jurisdictions have passed upon the issue and twenty-eight of these jurisdictions sustain the right of a payee or owner to recover against a bank which has collected his check upon an unauthorized endorsement. At present, only one jurisdiction holds to the contrary. The American jurisdictions which sustain the right of the owner to hold a collecting bank liable include *Alabama,* Allen v. M. Mendelsohn & Son, 207 Ala 527, 93 S 416, 31 ALR 1063, *Arkansas,* Schaap v. First National Bank, 137 Ark 251, 208 SW 309; *California,* George v. Security Trust & Savings Bank, 91 CA 708, 267 P 560; *Colorado,* U. S. Portland Cement Co. v. U. S. Bank, 61 Colo 334, 157 P 202, LRA 1917A, 145; *District of Columbia,* Merchants' Bank v. National Capital Press, *supra; Illinois,* Hamlin's Wizard Oil Co. v. U. S. Express Co., 265 Ill 156, 106 NE 623; *Indiana,* Indiana National Bank v. Holtsclaw, 98 Ind 85; *Iowa,* Home Indemnity Co. v. State Bank of Fort Dodge, 233 Iowa, 103, 8 NW 2d 757; *Kansas,* Railroad Bldg., Loan & Savings Assn. v. Bankers Mortgage Co., 142 Kan 564, 51 P 2d 61; *Kentucky,* Meyer v. Rosenheim, 115 Ky 409, 73 SW 1129; *Maryland,* National

The rule adopted by the trial Court is logically unsound, since it could result only in circuity and multiplicity of litigation.

Obviously, the proper forum for the correction of such an error is the Court of Appeals, and a petition to this Court should be unnecessary. However, the Court of Appeals did not respond to this issue—the only one legitimately before it. It avoided its respon-

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Union Bank v. Miller Rubber Co., 148 Md 449, 129 A 688; *Massachusetts*, A. Blum's Sons v. Whipple, 194 Mass 253, 80 NE 501; *Minnesota*, Moler v. State Bank of Bigelow, 176 Minn 449, 223 NW 780, 62 ALR 799; *Mississippi*, Thomas v. First National Bank, 101 Miss 500, 58 S 478; *Missouri*, Good Roads Machinery Co. v. Broadway Bank, Mo App , 267 SW 40; *New Hampshire*, Security Fence Co. v. Manchester Federal Savings & Loan Assn., 101 NH 190, 136 A 2d 910; *New Jersey*, Buckley v. Second National Bank, 35 NJL 400, 10 Am Rep 249; *New York*, People v. Bank of North America, 75 NY 547; *North Carolina*, Charles M. Britt Company v. Barefoot & Tatum Drugs, Inc., 240 NC 755; 83 SE 2d 883; *North Dakota*, Crisp v. State Bank, 32 ND 263, 155 NW 78; *Ohio*, Shæffer v. McKee, 19 Ohio St 526; *Oklahoma*, May v. City Bank & Trust Co., Okla , 258 P 2d 945; *Pennsylvania*, Lindsley v. First National Bank, 325 Pa 393, 190 A 876; *Tennessee*, Farmer v. People's Bank, 100 Tenn 187, 47 SW 234; *Texas*, Fidelity & Deposit Co. v. Fort Worth National Bank, 65 SW 2d 276 (Tex Comm App 1933); *Washington*, California Stucco Co. v. Marine National Bank, 148 Wash 341, 268 P 891, 67 ALR 1531; *Wisconsin*, National Surety Corporation v. City Bank & Trust Co., 248 Wis 32, 20 NW 2d 559; *Wyoming*, Trails Motors v. First National Bank, 76 Wyo. 152, 301 P 2d 775.

The only American jurisdiction presently holding to the contrary is Louisiana. M. Feitel House Wrecking Co. v. Citizens' Bank & Trust Co., 2 La App 118, aff'd 159 La 752, 106 S 292. At one time, Pennsylvania also denied recovery to the owner of the check, basing its holding on the lack of privity, but the case of Tibby Bros. Glass Co. v. Farmers' & Merchants Bank, 220 Pa. 1, 69 A 280, 15 LRA (NS) 519, was expressly overruled in Lindsley v. First National Bank, *supra*.

sibility for correcting the error of the trial Court by roving outside the record to find a document which had not been tendered nor admitted in evidence. On the basis of this document, as to the validity or admissability of which petitioner had had no opportunity to be heard, the Court affirmed the erroneous judgment. This Court has established as a rule of procedure the requirement that an affirmance on another ground than that utilized in the trial Court is erroneous, unless it is clear that the appellant can not be prejudiced by the action. *Peck* v. *Heurich*, 167 US 624; *Lutcher & Moore Lumber Co.* v. *Knight*, 217 US 257, 267; Cf. *Van Huffel* v. *Harkelrode*, 284 US 225, 229; *Farmers' Guide Co.* v. *Prairie Farmer Publishing Co.*, 293 US 268, 281. The Court of Appeals adopted this procedural guide for itself in *Scott* v. *Herrell*, 27 App DC 395, 401.

The importance of the case, an importance sufficient to invoke the supervisory jurisdiction of this Court, arises not from the issue decided but from the manner of its decision. Fundamental fairness requires that litigants be heard on a dispositive issue before their rights are adversely determined. The action of the Court of Appeals in failing to respond to the issue actually before it, and in determining the question of the assignment, deprived petitioner of this right to be heard on the validity of the instrument. Such an action strikes at the very heart of judicial fairness, and such a procedure, if approved *sub silentio*, would create real doubts as to the fairness of a judicial procedure which tolerates such determinations.

That the petitioner had available cogent reasons for the disregard of the putative assignment as a defense for the bank was made clear in the Petition for Rehearing. (R., pp. 188-202)

When this petition for rehearing was filed, the Court of Appeals again avoided a response to the issues. Instead, it ordered (R., p. 207) that its opinion be amended by inserting the statement that, as to the check in question, "There was no evidence whatsoever as to the actual intent of the maker, and it could reasonably be inferred from the record that plaintiff was not the named payee."

This statement, the petitioner submits with all respect to the Court of Appeals, is simply not true. The assertion that there is any doubt as to the identity of the intended payee of the check in question hangs upon the flimsy gossamer that the County made the check payable to "Kahn Engineering Company" (R., p. 118a) instead of to "Kahn Engineering Co., Inc." To deny the petitioner and its creditors the right to a substantial sum of money because of this most trivial misnomer, is of itself judicially indefensible.

While it is true that no official of the county was called to testify that the County intended to pay its debt to the person which it owed, there was substantial circumstantial evidence which rationally justified the conclusion that the check was intended for the petitioner. This circumstantial evidence included

1. The fact that the contract was with the petitioner, and it was the petitioner to which the money was owed. (R., p. 113 et seq.) By the law of Maryland, where the check was actually drawn, the existence of the written contract is dispositive of the issue of identity of the intended payee. *Lanasa* v. *Griswold*, 151 Md. 26, 32, 133 A 840.

2. Although the County had paid three checks. (R., pp. 56, 58, 60) to Kahn Engineering Co. of Md., Inc.,

the next check following the change of the name of the Maryland corporation to Academy Construction, Inc., was not made payable to Academy, and the really significant omission was that of the words, "of Maryland, Inc."

3. In the final settlement of the contract, the County officials claimed credit for this check as having been made to the petitioner. (R., p. 29)

The Court of Appeals has, in reality, determined as a matter of fact that it will choose which of two *fact* inferences—assuming that any inference that Academy Construction, Inc. was the intended payee is rationally supportable—it will accept. But the determination of fact questions and the drawing of inferences from the evidence is the province neither of the trial Court nor the Court of Appeals. That determination is the province of the jury alone. The citation of authority for such a fundamental rule is, we believe, wholly superfluous. The rule has been stated by this Court time and again (e.g., *Wilkerson* v. *McCarthy*, 336 US 53; *Stone* v. *New York C., & St. L. R. Co.*, 344 US 407; *Schulz* v. *Pennsylvania R. Co.*, 350 US 523).

The failure of the Court of Appeals to apply this fundamental distinction between the province of the Court and the province of the jury, a distinction required by the Seventh Amendment to the Constitution of the United States, was a second and again fundamental departure from the normal and accepted judicial procedure.

The full effect of the Court of Appeals' action was to deprive petitioner of a fair determination of its rights. It is for that reason that the petitioner seeks the aid of this Court, sincerely believing that the pro-

cedure of the Court of Appeals was so lacking in accord with basic and fundamental rules of procedure as to require the supervisory action of this Court.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Ruling of the Trial Court

THE COURT: The Court concludes on the basis of the testimony before it, and confining its ruling, of course, to the testimony and the exhibits which are actually in evidence, that the plaintiff has not made a case against the bank. I don't think under the circumstances of this case that the defendant, American Security & Trust Company, is liable. I have no views as to the question of liability as between Kahn Engineering Company and the third party defendants, but since they are not defendants in the present action, the Court's granting of the defendant American Security & Trust Company's motion for a directed verdict disposes of the entire case.

I repeat, I express no views as to the existence of any liability as between the plaintiff and the third party defendants, but I am convinced upon the basis of the testimony before me that there is no liability on the part of the bank under the peculiar circumstances of this case, and giving recognition to the fact that the defendant bank was not the bank upon whom the check was drawn, nor was it the bank in which the corporate account of the plaintiff was maintained. I believe under all of these qualifying circumstances in this case that the Court is required to grant the motion for directed verdict for the American Security & Trust Company.

APPENDIX B

Filed December 11, 1958

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,394

KAHN ENGINEERING CO., INC., APPELLANT

v.

AMERICAN SECURITY & TRUST COMPANY,
a banking corporation, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided December 11, 1958

Mr. Carl W. Berueffy for appellant.

Mr. J. Roy Thompson, Jr., with whom *Mr. Bernard J. Gallagher* was on the brief, for appellee.

Before WILBUR K. MILLER, BAZELON and BURGER, Circuit Judges.

PER CURIAM: Kahn Engineering Co., Inc., sued American Security and Trust Company to recover $23,069.41, alleging the bank accepted for deposit by another, and collected the proceeds of, a check for that sum payable to it but bearing an unauthorized endorsement. The check was endorsed as follows:

> "Kahn Engineering Co.
> L. Ray Troxell, Jr.
> President
> Deposit to account of
> Academy Construction, Inc."

The American Security and Trust Company brought in a number of third-party defendants, including the endorser of the check and one Herbert L. Bright, at whose direction the endorsement had been made.

Among several defenses, the answer of the third-party defendants contained the following:

> "Third party defendants further aver that plaintiff has no interest in this action in that, on to-wit, September 3, 1954, subsequent to the negotiation of the check herein in issue, plaintiff assigned all of its right, title and interest in and to any indebtedness due it by Academy Construction, Inc., (Kahn Engineering Co. of Md., Inc., and/or Herbert Lawrence Bright Co., Inc.,) unto third party defendant, Herbert Lawrence Bright, which assignment included of necessity any claim for indebtedness upon the check herein."

A written assignment of that nature was filed as an exhibit.

Even assuming that the above assignment was ineffective as to the subject matter of this litigation, plaintiff failed to make out a prima facie case that it was the named payee of the check in question. There was no evidence whatsoever as to the actual intent of the maker, and it could reasonably be inferred from the record that plaintiff was not the named payee. Plaintiff thus failed to produce any evidence on a critical point of its case.

At the conclusion of plaintiff's evidence, the trial judge directed a verdict for the defendant. Kahn Engineering Co. appeals. We find no error.

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant its taxable costs on this appeal and have execution therefor.

Per curiam.

Dated: December 11, 1958.

APPENDIX D

Statutes Involved

Statutes relevant in the consideration of this case include Uniform Negotiable Instruments Law, Title 28, D.C. Code (1951 edition), Act of March 3, 1901, 31 Stat. 1395 *et seq.*, ch. 854:

§ 101. *Definitions—Sundays and holidays—Application of the law merchant.* In chapters 1-10 of this title unless the context otherwise requires—

* * * *

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

§ 109. *Instrument payable to order.* The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of—

First. A payee who is not maker, drawer, or drawee, or

Second. The drawer or maker; or

Third. The drawee; or

Fourth. Two or more payees jointly; or,

Fifth. One or some of several payees; or

Sixth. The holder of an office for the time being.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

§ 110. *Instrument payable to bearer.* The instrument is payable to bearer—

First. When it is expressed to be so payable; or

Second. When it is payable to a person named therein or bearer; or

Third. When it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable; or

Fourth. When the name of the payee does not purport to be the name of any person; or

Fifth. When the only or last indorsement is an indorsement in blank.

§ 122. *Signature by procuration.* A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

§ 124. *Signature forged or without authority.* Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment

thereof, against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

§ 301. *Definition—Bearer instrument—Order Instrument.* An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder, completed by delivery.

Uniform Fiduciaries Act, Title 28 D. C. Code (1951 edition), Act of May 14, 1928, 45 Stat. 509, ch. 545:

§ 2301. *Definitions.* The following provisions concerning liability for participation in breaches of fiduciary obligations, and to make uniform the law with reference thereto, shall be in force in the District of Columbia, namely:

(1) In this chapter, unless the context or subject matter otherwise requires:

* * *

"Fiduciary" includes a trustee under any trust, express, implied or resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust, or estate.

* * *

§ 2304. *Transfer of negotiable instruments by fiduciary.* If any negotiable instrument payable or indorsed to a fiduciary as such is indorsed by the fiduciary, or if any negotiable instrument payable or indorsed to his prin-

cipal is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal, the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation in indorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as a fiduciary in transferring the instrument.

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FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 970

KAHN ENGINEERING CO., INC., *Petitioner*,

v.

AMERICAN SECURITY & TRUST COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMERICAN SECURITY AND TRUST COMPANY IN OPPOSITION

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QUESTION PRESENTED

Whether the United States District Court for the District of Columbia, the trial court, was correct, as held by the United States Court of Appeals for the District of Columbia Circuit, in directing a finding for respondent at the close of petitioner's case when

petitioner had not made out a prima facie case that it was the named payee of a check for $23,069.41 which on its face was not payable to petitioner.

STATUTES INVOLVED

In addition to the statutes recited by petitioner the following are involved:

Uniform Negotiable Instruments Law, Title 28, D. C. Code, 1951 Edition, Act of March 3, 1901, 31 Stat. 1395, et seq, Ch. 954, sections as follows:

102. An instrument to be negotiable must conform to the following requirements: * * *

Fifth. Where the instrument is addressed to a drawee he must be named or otherwise indicated therein with reasonable certainty.

120. The signature of any party may be made by a duly-authorized agent. No particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency.

314. Where the name of a payee or indorsee is wrongly designated or misspelled he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

402. A holder in due course is a holder who has taken the instrument under the following conditions:

First. That it is complete and regular upon its face.

Second. That he became the holder of it before it was over due, and without notice that it had been previously dishonored, if such was the fact.

Third. That he took it in good faith and for value.

Fourth. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating.

STATEMENT

This case involves an attempt on the part of one of two originally interrelated close corporations to impose its claimed, though disputed, loss on a building contract that was in process at the time of the separation of the corporations upon a bank that accepted and collected a check in the regular course of its business.

Originally Kahn Engineering Co., Inc. and Kahn Engineering Co. of Md., Inc. were close corporations having common stockholders, officers and directors. (R. 20-22, 25, 33, 39, 86-88, 112, 140, 170, 175, 181, 183) On November 17, 1953 the Commissioners of Baltimore County, Maryland and Kahn Engineering Co., Inc. entered into a contract to build the Parkville Fire and Police Station in Towson, Maryland. (R. 113-116) The job was performed by Kahn Engineering Co. of Md., Inc. until September 3, 1954. (R. 45, 50-51, 54) On September 3, 1954 the principals determined to separate their business enterprises and a series of documents and agreements signifying this separation were executed. (R. 163-179) After this date the Parkville job became the responsibility of Kahn Engineering Co., Inc. (R. 27, 28)

The check in question was dated August 11, 1954, was issued upon the requisition of Kahn Engineering Company of Maryland, Inc. (R. 151-152), and was payable to Kahn Engineering Company [sic] in the amount of $23,069.41. (R. 118a)

Appendix A attached hereto is a table showing the manner in which payments were made on the Park-

ville job. This table shows that each monthly check, starting in February, 1954, and including the one here in question issued in August, 1954, were intended by the maker to be payable to Kahn Engineering Co. of Md., Inc., the corporation that was performing the work for the maker.

In April, 1954 the name of Kahn Engineering Co. of Md., Inc. was formally changed to Academy Construction, Inc. (R. 26, 60, 139-140), but this, of course, did not affect the operation of, or responsibility for, the carrying forward of, the Parkville job. (R. 61)

The check in question was payable to Kahn Engineering Company (not the petitioner, Kahn Engineering Co., Inc.) was endorsed and deposited in respondent bank by Academy Construction, Inc., formerly Kahn Engineering Co. of Md., Inc. (R. 118b) Respondent bank collected the check and the proceeds thereof were paid out in regular course upon the order of its depositor. (R. 98-99)

At the close of petitioner's case below respondent moved for a directed verdict on grounds, *inter alia*, that there was no showing that the check in question was the property of petitioner at any time. This motion was granted. On appeal the propriety of this decision was affirmed.

ARGUMENT

The respondent will show in this brief, (1) that no question is present in this case that requires review; (2) that the case does not call for an exercise of this Court's supervisory jurisdiction; (3) that the United States Court of Appeals for the District of Columbia Circuit was correct in affirming the action of the

United States District Court for the District of Columbia.

1. *No Question is Presented in this Case that Requires Review.* Petitioner does not contend for nor show the presence of the usual grounds which would impel review by this Court, i.e., conflict of decisions between circuits, or an important federal question. This case presents a purely local question involving an application of usual rules to an ordinary commercial transaction.

2. *The Case Does Not Call For An Exercise Of This Court's Supervisory Jurisdiction.* Petitioner asserts that the action of the Circuit Court below justifies a review on the ground just stated. While not crystal clear it seems that its argument is based on two grounds, (1) that the ruling of the trial court was erroneous, and (2) that the United States Court of Appeals for the District of Columbia Circuit erroneously affirmed. The issues presented are thus identical.

The main thrust of petitioner's argument is that the Circuit Court mentioned an assignment (also called a release) by petitioner of the claim here sued on in its opinion, which assignment was not introduced into evidence but only marked for identification. Petitioner then argues that it, thus, was deprived of an opportunity to meet the issues presented by this assignment.

A short answer to this argument is that the final decision of the Circuit Court affirmed the trial court "even assuming that the above assignment was not effective." As the Circuit Court's decision was based on the failure of petitioner to make out a prima facie

case it seems unnecessary to discuss the effect of the assignment. In view, however, of the insistence by petitioner that it has not had an opportunity to meet the issues presented by the assignment, respondent will set the issue at rest.

If petitioner did not meet the issue raised by the assignment, sometimes called a release, it cannot be said that it was not on notice that the assignment was an issue in the case.

The second paragraph of respondent's pretrial statement specifically put in issue the release in the following language:

> "Plaintiff has released and assigned all its claim, including the present one, to other parties and, consequently, may not maintain this action". (R. 12)

The Circuit Court correctly recited in its decision that the third-party defendant asserted a similar defense in its answer. (R. 8) Third-party defendant also carried this defense into the pretrial order. (R. 14) It is thus apparent that petitioner was, or should have been fully apprised of this issue.

Respondent urged this issue before the Circuit Court but did so not on the ground that the particular document was in evidence, but on the ground that petitioner's principal witness, who was President of petitioner at all pertinent times, testified on cross-examination that petitioner had released its claims. The colloquy appearing at Record 90 set out in the footnote[1] hereto sets this point at rest.

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[1] "Q. And at that same time and those same agreements, you did also, on behalf of Kahn Engineering Company, Inc., acting as its President, and I refer specifically to Defendant's Exhibit No.

Under the circumstances the extraordinary remedy of invoking this Court's supervisory jurisdiction is obviously not called for. It is submitted that petitioner is merely seeking another hearing. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163.

3. *The United States Court of Appeals for the District of Columbia Circuit Was Correct in Affirming the United States District Court for the District of Columbia.* The check in question was payable to "Kahn Engineering Company". The petitioner is "Kahn Enginering Co. Inc." In order for petitioner to survive a motion for a directed verdict at the close of its case it was required to show that it was the named payee.

Title 28, § 102, D. C. Code, 1951 ed., provides a test of negotiability, as follows:

> "Fifth. Where the instrument is addressed to a drawee he must be named or otherwise indicated therein with reasonable certainty."

The presumption is that title goes with possession. *Ogden* in his work on Negotiable Instruments (1909) recites in § 318, at p. 248, the presumptions that arise when a negotiable instrument is introduced into evidence. He states in such event there arises

> "a presumption of title on good consideration from the fact of possession."

---

35 for identification, you did release on behalf of Kahn Engineering Company, Inc., each and every claim which it had against Academy Construction, Inc., did you not, sir?

• • •

"THE WITNESS: At the time this document was executed, we stipulated that the present indebtedness, which in our knowledge was between ten and twelve thousand dollars—*all claims at this time were released, yes, sir.*" (Emphasis supplied)

The check in question, as were all prior checks on this job, was delivered to the Maryland corporation either under its name as Kahn Engineering Co. of Md., Inc. or Academy Construction, Inc.

Title 28, § 314, D. C. Code, 1951 ed., provides:

> "Where the name of a payee or indorsee is wrongfully designated or misspelled he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature."

The endorsement placed on the instrument "Kahn Engineering Co., L. Ray Troxell, Jr., President" was strictly in accordance with this quoted provision of the uniform negotiable instrument law. This endorsement was placed on the check in a representative capacity and follows the procedure prescribed in Title 28, § 314, upon the proper assumption and presumption that the intended payee of the check was the Maryland corporation.

The course of conduct between the parties is a complete and unchallengable answer to any suggestion that the Treasurer of Baltimore County intended the check to be paid to the petitioner. The record shows that only the first check on this job was payable to the petitioner and that check was indorsed "For deposit only to the credit of Kahn Engineering Co., of Md. Inc., Special Account." Appellant could just as well complain that this indorsement was improper. The next three checks were payable in turn to the Maryland corporation and indorsed by that corporation. The next four checks (the last of the four being the check here at issue) were payable to Kahn Engineering Company. We thus see that out of the first eight checks issued by the Treasurer of Baltimore

County covering a period of eight months all of them went to the Maryland corporation. It is somewhat difficult, therefore, to give credence to petitioner's argument that it can be inferred that the Treasurer intended the checks be payable to it.

This course of conduct is corroboration of appellant's witness Kahn when he testified that he intended the proceeds of the job payments to go to the Maryland corporation and be used by it to pay job costs. (R. 56) As Kahn testified (R. 80), the Parkville money was "their money"—meaning money of the Maryland corporation.

This course of conduct is a complete answer to the argument that the petitioner was intended to be the named payee on the check and is completely dispositive of the issues raised by petitioner in its petition.

The intention of the Treasurer of Baltimore County, the maker of the check, was crucial to the petitioner's case. The plain undisputed fact is that petitioner did not call that officer or any witness to show that the intended payee of the check was petitioner. Petitioner did not explain its failure to call such witnesses or produce such testimony. *Wigmore on Evidence*, 3d ed. (1940), Vol. 2 § 285, at p. 162, states:

> "The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the party's cause.*"

The trial court was, of course, entitled to take this fundamental rule of law into consideration in determining whether petitioner made a bona fide case. The essence of petitioner's argument is the erection of inference on inference and petitioner's case must

necessarily fall under the weight of the factual evidence against it and the applicable law.

The Circuit Court could just as validly have based its affirmance on any one of the following grounds:

1. Petitioner's evidence failed to show that the endorsement in question was unauthorized.

2. Petitioner failed to prove any damage.

3. Petitioner's evidence showed that the check in question was a bearer instrument not requiring endorsement.

4. Petitioner's evidence showed that it is precluded from asserting that the endorsement was unauthorized by its ratification thereof.

5. Petitioner's evidence showed that it is precluded from recovery by the doctrine of equitable estoppel or laches.

6. Petitioner's evidence showed that it is precluded from recovery by its contributory negligence.

Under all the circumstances the endorsement of the Maryland corporation to the check in question was proper and petitioner's case was correctly dismissed at the conclusion of its evidence.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

June, 1959

EXHIBIT A

REQUISITIONS AND PAYMENTS ON PARKVILLE JOB

No.	Requisition Date	Requisition Submitted by	Named Contractor on Requisition	Amount of Requisition and Check	Date of Payment Check	Payee on Check	Indorsements on Checks (Other than Banks)
1	1/ 8/54	Kahn Engr. Co. Inc., Contractor	Kahn Engineering Company Incorporated	$13,806.44	1/20/54	Kahn Engineering Co. Inc.	For deposit only to the credit of Kahn Engineering Co. of Md., Inc., Special Account
2	2/ 4/54	L. Ray Troxell, Jr. President	Kahn Engineering Company of Maryland, Inc.	4,860.01	2/10/54	Kahn Engineering Co. of Md. Inc.	For deposit only to the credit of Kahn Engineering Co., Inc. of Md.
3	3/ 5/54	Ray Troxell, Jr. Contractor	Kahn Engineering Company of Maryland, Incorporated	17,541.00	3/10/54	Kahn Engineering Co. of Md. Inc.	For deposit only to the credit of Kahn Engineering Co., Inc. of Md.
4	3/20/54	Ray Troxell, Jr. Contractor	Kahn Engineering Company of Maryland, Inc.	18,940.50	4/ 9/54	Kahn Engineering Co. of Maryland, Inc.	For deposit only to the credit of Kahn Engineering Co., Inc. of Md.
5	4/30/54	Ray Troxell, Jr. Contractor	Kahn Engineering Company of Maryland, Inc.	22,343.85	5/12/54	Kahn Engineering Company	For deposit only to the credit of Kahn Engineering Co., Inc. of Md.
6	6/ 7/54	Ray Troxell Contractor	Kahn Engineering Company of Maryland, Inc.	18,175.50	6/16/54	Kahn Engineering Company	For deposit only Kahn Engineering Co.
7	7/ 1/54	Ray Troxell, Jr. Contractor	Kahn Engineering Company of Md., Inc.	18,575.41	7/19/54	Kahn Engineering Company	Kahn Engineering Company L. Ray Troxell, Jr. President Payable to: Academy Construction, Inc. For deposit only to the credit of Academy Construction, Inc.
8	7/30/54	Ray Troxell, Jr. Contractor	Kahn Engineering Company of Maryland, Inc.	23,069.41	8/11/54	Kahn Engineering Company	Kahn Engineering Co. L. Ray Troxell, Jr. President Deposit to account of Academy Construction, Inc.